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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 231.

ESTHER S. SNYDER AND GEORGE A. FRINK, ADMINISTRATORS OF C. BROWN SNYDER, DECEASED, PLAINTIFFS IN ERROR,

vs.

EMIL V. FIEDLER, ADMINISTRATOR DE BONIS NON OF FRANCIS J. LIEBSCH, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 14, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 7, 1890.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Emil V. Fiedler, of Boston, in the district of Massachusetts, administrator *de bonis non* of the estate of Francis J. Liebsch, late of Boston, deceased, intestate, plaintiff, and Esther S. Snyder and George A. Frink, both of the city of New York, administrators of the estate of C. Brown Snyder, deceased, intestate, defendants, in an action of contract, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-third day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

BENJ. H. BRADLY,
Deputy Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by—
THOMAS L. NELSON,
U. S. District Judge, Sitting in Circuit Court.

2 Circuit Court of the United States, District of Massachusetts, *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this tenth day of September, A. D. 1887.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Monday, the sixteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven, the fifteenth day of said May happening on a Sunday, before the Honorable Le Baron B. Colt, circuit judge.

EMIL V. FIEDLER, of Boston, in the District of Massachusetts, as he is Administrator *de bonis non* of the Estate of Francis J. Liebsch, late of said Boston, Deceased, Intestate, Plaintiff,
v.
ESTHER S. SNYDER and GEORGE A. FRINK, Both of the City of New York, as they are Administrators of the Estate of C. Brown Snyder, Deceased, Intestate, Defendants. } No. 2559.

In an action of contract.

The writ in this cause is dated the thirtieth day of April, A. D. 1885, and was made returnable before the justices of the superior court of the Commonwealth of Massachusetts, then next to be holden at Boston, within and for the county of Suffolk, on the first
4 Tuesday of July, A. D. 1885, and was thence removed to this circuit court upon the petition of the defendants, filed and allowed in said superior court, and was entered here at the October term of this court, A. D. 1885, when and where the parties appeared by their respective attorneys.

Upon the entry of said cause in this circuit court attested copies were filed of the following six papers on file in the said superior court, namely: 1, writ, with return of service thereon; 2, plaintiff's declaration; 3, appearance; 4, defendants' answer; 5, petition for removal and allowance thereon; 6, bond on removal. Said attested copies are in the words and figures following:

(1.)

Writ.

COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

To the sheriffs of our several counties or their deputies, Greeting:
[L. S.]

We command you to attach the goods or estate which were of C. Brown Snyder, late of Boston, in said county of Suffolk, now in the hands and under the administration of Esther S. Snyder and George A. Frink, both of the city of New York, as they are administrators of the estate of said C. Brown Snyder, deceased, intestate, to the value of twelve thousand dollars, and to summon the

said Esther S. Snyder and George A. Frink, in their capacity of and as they are administrators as aforesaid (if they may be found in your precinct), to appear before our justices of our superior court next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of July next, then and there, in our said court, to answer unto Marie R. Liebsch, of said Boston, as she is administratrix of the estate of Francis J. Liebsch, late of said Boston, deceased, intestate, in an action of contract, to the damage of the said plaintiff (as she says) the sum of twelve thousand dollars, which shall then and there be made to appear, with other due damages; and have you there this writ with your doings therein.

Witness Lincoln Flagg Brigham, Esq., at Boston, the thirtieth day of April, in the year of our Lord one thousand eight hundred and eighty-five.

JOS. A. WILLARD, *Clerk.*

Copy.

Att.: JOS. A. WILLARD, *Clerk.*

Officer's Return.

SUFFOLK, *ss:*

BOSTON, *May 1st*, 1885.

By virtue of this writ I this day attached a chip, which was of the property of the within-named C. Brown Snyder, now in the hands and under the administration of Esther S. Snyder and George A. Frink, administrators of the estate of said C. Brown Snyder, and summoned said administrators to appear at court, as within directed, by delivering a summons, together with an attested copy of this writ for each of them, to Moorefield Story, Esquire, he being their duly appointed attorney upon whom service of process is to be made in this Commonwealth.

WM. D. MARTIN,
Deputy Sheriff.

Service	1 00
Copies	2 00
Travel	08
	3 08

Copy.

Att.: JOS. A. WILLARD, *Clerk.*

6 (2.)

SUFFOLK, *ss:*

Superior Court. July Term, 1885.

MARIE R. LIEBSCH, Administratrix,
v.
ESTHER S. SNYDER *et al.*, Administrators.

Plaintiff's Declaration. (*Filed July* 7, 1885.)

And the plaintiff says that she is the legally appointed administratrix of the goods and estate of Francis J. Liebsch, late of Boston, in said county of Suffolk, deceased; that said Liebsch died in December, in the year 1880; that on the fifteenth day of October, in the year 1876, the said Francis J. Liebsch delivered to C. Brown Snyder, the defendants' intestate, the sum of five thousand dollars, the property of said Francis, which sum said Snyder promised the said Francis to invest for him and for his benefit and profit; that said Snyder never invested said moneys nor accounted with said Francis for the same of any investments thereof and never repaid the same to said Francis, nor has said Snyder or his administrators ever paid said moneys to the plaintiff, administrator, as aforesaid, although often requested so to do by the plaintiff; and the plaintiff says that said C. Brown Snyder died on or about the 18th day of July, in the year 1882, and that the defendants were legally
7 appointed administrators of his goods and estate in this Commonwealth on the 14th day of May, in the year 1883; and the plaintiff says that the defendants owe the plaintiff five thousand dollars and interest thereon since the said 15th day of October, 1876.

And the plaintiff says that the defendants owe her five thousand dollars for money lent on the 15th day of October, A. D. 1876, by the plaintiff's intestate, Francis J. Liebsch, to defendants' intestate, C. Brown Snyder, together with interest thereon since said day.

And the plaintiff says that the defendants owe her seven thousand five hundred and seventy-five dollars, according to the account hereto annexed.

Account Annexed.

5,000 delivered to C. Brown Snyder, the defendants' intestate, by Francis J. Liebsch, the plaintiff's intestate, on the 15th day of October, 1876, and 2,575, interest thereon since that day.

JOHN P. TREADWELL,
Attorney for Plaintiff.

Copy.

Att.: JOS. A. WILLARD, *Clerk.*

(3.)

SUFFOLK, *ss:*

Superior Court. July Term, 1885.

MARIE R. LIEBSCH, Adm'x, Pl'ff,
v.
ESTHER S. SNYDER *et al.*, Adm'rs, D'f'ts.

Appearance. (*Filed July* 15, 1885.)

In the above action we appear for defendants.

BALL, STORY & TOWER,
Attorneys for Defendants.

Copy.
Att.: JOS. A. WILLARD, *Clerk.*

8 (4.)

SUFFOLK, *ss:*

Superior Court. July Term, 1885.

MARIE A. LIEBSCH, Adm'x,
v.
ESTHER S. SNYDER *et al.*, Adm'rs.

Defendants' Answer. (*Filed Aug. 6th,* 1885.)

And now the defendants come and for answer to the plaintiff's writ and declaration say that C. Brown Snyder died on the eighteenth day of July, in the year eighteen hundred and eighty-two, intestate, and that the defendants were duly appointed administrators by the judge of probate for the county of Suffolk of the goods and estate within the Commonwealth of Massachusetts of said C. Brown Snyder on the fourteenth day of May, A. D. eighteen hundred and eighty-three, and duly gave bond as such administrators on the same day, which was duly approved on the same day by said judge of probate, and that they gave due notice of their appointment as such administrators according to the order of said judge of probate.

And these defendants, further answering, say that they are ignorant whether Francis J. Liebsch, mentioned in the plaintiff's declaration, died at the time alleged by the plaintiff or at some other time, so that the defendants can neither admit nor deny the plaintiff's allegation as to the time of his death, but leave the plaintiff to prove the same.

And these defendants, further answering, deny that said Francis J. Liebsch delivered to C. Brown Snyder, the defendants' intestate, either at the time alleged or at any other time, the sum of five thousand dollars or any other sum, the property of said Francis
9 J. Liebsch, and deny that said C. Brown Snyder ever promised to said Francis J. Liebsch to invest any sum for him or for his benefit or profit; and they deny that said Francis J. Liebsch ever lent, either at the time alleged or at any other time, the sum

alleged or any other sum to said C. Brown Snyder, and deny that said Francis J. Liebsch ever delivered to said C. Brown Snyder, either at the time alleged or at any other time, the sum of five thousand dollars or any other sum, and deny that the plaintiff ever requested the defendants to pay her the sum alleged by her or any part thereof, and deny that these defendants owe the plaintiff either of the sums alleged by her or any part of either of them or any other sum or any interest whatsoever.

And these defendants deny each and every other allegation in the plaintiff's writ and declaration contained, and also deny each and every item and allegation in the account annexed to the plaintiff's declaration contained.

And these defendants, further answering, say that if said Francis J. Liebsch ever delivered to said C. Brown Snyder any money whatsoever to invest (which these defendants deny) said C. Brown Snyder duly invested the same and duly accounted for and delivered the property representing the same to said Francis J. Liebsch, and that if said Francis J. Liebsch ever lent or delivered any money whatsoever to said C. Brown Snyder, which these defendants deny, said C. Brown Snyder duly repaid the same to said Francis J. Liebsch.

And these defendants, further answering, say that this action was not commenced against these defendants within two years after the granting to them of letters of administration on the estate of said C. Brown Snyder or within two years from the time of their giving bond for the discharge of their trust as administrators as aforesaid.

ESTHER S. SNYDER,
GEORGE A. FRINK,
Administrators,
By BALL, STORY & TOWER,
Their Att'ys.

Copy.
Att.: JOS. A. WILLARD, *Clerk.*

(5.)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Superior Court.

MARIE A. LIEBSCH, Administratrix,
v.
ESTHER S. SNYDER *et al.*, Administrators.

Petition for Removal. (*Filed Sept.* 25, 1885.)

To the honorable the justices of the superior court within and for the county of Suffolk:

Respectfully represent Esther S. Snyder and George A. Frink, administrators of the goods and estate of C. Brown Snyder, deceased,

intestate, that your petitioners are defendants in the above-entitled suit now pending in this honorable court; that the plaintiff in said suit at the time of the commencement thereof was and ever since has continued to be and still is a citizen of the State of Massachusetts, and that the said Esther S. Snyder and George A. Frink, the defendants in said suit, at the time of the commencement of said suit were and ever since have continued to be and still are citizens of the State of New York.

That said suit is a suit at law of a civil nature, and the
11 matter in dispute in said suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that in said suit there is a controversy between citizens of different States; and your petitioners, the said Esther S. Snyder and George A. Frink, administrators, the defendants in said suit, desire to remove said suit from said superior court to the circuit court of the United States for the first circuit within and for the district of Massachusetts; and now, before the term of this honorable court at which said suit could be first tried and before the trial thereof, said Esther S. Snyder and George A. Frink make and file in said suit this their petition for the removal of said suit into the circuit court of the United States for the first circuit next to be holden at Boston, within and for the district of Massachusetts, on the fifteenth day of October, A. D. eighteen hundred and eighty-five, and make and file herewith a bond, with good and sufficient surety, for their entering in said circuit court on said fifteenth day of October, being the first day of its next session, a copy of the record in said suit and for paying all costs that may be awarded by said circuit court if said circuit court shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore your petitioners, the said Esther S. Snyder and George A. Frink, administrators as aforesaid, pray that said suit may be so removed, and that this honorable court will accept this petition and said bond and proceed no further in said suit.

ESTHER S. SNYDER,
GEORGE A. FRINK,
Administrators.

Copy.
Att.: JOS. A. WILLARD, *Clerk.*

Endorsed: Filed Sep. 25, 1885, & Oct. 6, 1885. Petition allowed & removal ordered. Attest: Edw'd A. Willard, 2d ass't clerk.

12 MARIE R. LIEBSCH, Adm'x,
v.
ESTHER S. SNYDER *et al.*, Adm'rs.

Bond to Remove into U. S. Circuit Court. (*Filed Sept.* 25, 1885.)

Know all men by these presents that we, Esther S. Snyder and George A. Frink, of the city, county, and State of New York, as principals, and Charles Marsh, of Boston, in the county of Suffolk, in the Commonwealth of Massachusetts, as surety, are held and

stand firmly bound unto Marie R. Liebsch, administratrix of the goods and estate of Francis J. Liebsch, late of Boston, in the county of Suffolk, deceased, intestate, in the sum of five hundred dollars, to be paid to the said Marie R. Liebsch, administratrix as aforesaid, her successors, heirs, executors, and administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals.

Dated the twenty-fifth day of September, A. D. eighteen hundred eighty-five.

The condition of this obligation is such that whereas, in the suit brought by said Marie R. Liebsch, as administratrix as aforesaid, against said Esther S. Snyder and George A. Frink, administrators of the goods and estate of C. Brown Snyder, deceased, intestate, in the superior court within and for the county of Suffolk, said Esther S. Snyder and George A. Frink, administrators as aforesaid, have filed their petition for the removal of said suit into the circuit court of the United States for the first circuit within and for the district of Massachusetts:

13 Now, if the said Esther S. Snyder and George A. Frink shall enter in said circuit court, on the fifteenth day of October next, being the first day of the next session of said circuit court, a copy of the record in said suit and pay all costs that may be awarded by said circuit court if said circuit court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be null and void; otherwise be and remain in full force and virtue.

ESTHER S. SNYDER. [SEAL.]
GEO. A. FRINK. [SEAL.]
CHAS. MARSH. [SEAL.]

Signed, sealed, & delivered in presence of—
WILLIAM L. EVERIT.
EDMOND H. TALBOT.

Copy.
Att.: JOS. A. WILLARD, *Clerk.*

This cause was thence continued from term to term to the October term, A. D. 1886, when, on the 9th day of December, a jury was empanelled and sworn according to law to try the issue, the Honorable George M. Carpenter, district judge of the United States for the district of Rhode Island, duly assigned to hold said circuit court, sitting. Thereupon, upon motion of counsel for plaintiff, the cause was withdrawn from the jury and continued to this present May term, A. D. 1887, when, on the first day of June, the Honorable Thomas L. Nelson, district judge, sitting and holding the court, a jury was empanelled and sworn according to law to try the issue. On the second day of said June the following motion was filed and allowed by the court as of December 13, 1886, by consent of both parties:

14 Circuit Court of the United States, District of Massachusetts.

MARIE R. LIEBSCH, Adm'x,
v.
ESTHER S. SNYDER *et al.*, Adm'rs.

Motion of Emil V. Fiedler, Adm'r, for Leave to Prosecute.

And now comes Emil V. Fiedler, of Boston, in said district, and says that Marie R. Liebsch, administratrix of the goods and estate of Francis J. Liebsch, resigned said trust on the thirteenth day of December, A. D. 1886, and that on the same day the said Emil V. Fiedler was duly appointed administrator *de bonis non* of the estate of said Liebsch by the probate court for the county of Suffolk, in said district, and gave bond as required by law.

And said Fiedler prays that he may be allowed to come in and prosecute the above-entitled action in the place and stead of the said Marie R. Liebsch, resigned.

EMIL V. FIEDLER,
By his attorney, JOHN P. TREADWELL.

The said cause was thereupon considered by the jury, who, after hearing all matters and things concerning the same, return their verdict therein and upon oath say:

Verdict.

The jury find for the plaintiff and assess damages in the sum of ($6,684.00) six thousand six hundred and eighty-four dollars.

On the third day of said June the following motion is filed:

15 *Motion to Set Aside Verdict for New Trial.* (*Filed June 3d, 1887.*)

And now, after verdict in the above-entitled cause and before judgment therein, the defendants come into court and move that the verdict in said cause be set aside and a new trial granted, and for reasons assign the following, to wit:

1st. Because there was not sufficient evidence in said cause to justify a verdict for the plaintiff.

2nd. Because said verdict is against the evidence and weight of evidence.

3d. Because the amount of said verdict is excessive.

ESTHER S. SNYDER & GEORGE A. FRINK,
Administrators,
By BALL & TOWER, *Their Attorneys.*

On the twenty-seventh day of said June the said motion is heard and denied by the court, the Honorable Thomas L. Nelson, district judge, sitting.

It is thereupon considered by the court, to wit, July 5, 1887—the Honorable Thomas L. Nelson, district judge, sitting—that the said

Emil V. Fiedler, administrator, plaintiff, recover of the said Esther S. Snyder and George A. Frink, administrators, defendants, the sum of six thousand seven hundred and nineteen dollars and sixty-four cents damages, and his costs of suit, taxed at —.

On the twenty-seven day of June, A. D. 1887, the following bill of exceptions is filed and allowed :

16 *Defendants' Bill of Exceptions.* (*Filed June* 24, 1887.)

This action of contract was brought in the superior court for the county of Suffolk, in the Commonwealth of Massachusetts, on the thirteenth day of April, A. D. eighteen hundred and eighty-five, by Marie R. Liebsch, administratrix of the estate of Francis J. Liebsch, deceased, against Esther S. Snyder and George A. Frink, administrators of the estate of C. Brown Snyder, deceased, to recover the sum of five thousand dollars, which the declaration alleges said Francis J. Liebsch delivered to C. Brown Snyder on the fifteenth day of October, in the year eighteen hundred and seventy-six, and which it alleges said C. Brown Snyder promised said Francis J. Liebsch to invest for him and for his benefit and profit, and which it alleges he, said C. Brown Snyder, never invested or accounted for or repaid to said Francis J. Liebsch. The cause was removed to this court by defendants and entered at the October term thereof, A. D. 1885. The plaintiff's counsel at the trial of the cause claimed that fourteen hundred dollars had been paid by the said C. Brown Snyder to said Marie R. Liebsch at different times after the death of said Francis J. Liebsch and before the death of the said C. Brown Snyder, which should be deducted from the claim in suit.

Said Francis J. Liebsch died in Boston, in the county of Suffolk, in Massachusetts, in December, in the year eighteen hundred and eighty, and the said Marie R. Liebsch, his widow, was appointed administratrix of his estate by the probate court for said county of Suffolk on the twenty-seventh day of April, A. D. eighteen hundred and eighty-five.

17 Said C. Brown Snyder died on the eighteenth day of July, in the year eighteen hundred and eighty-two, and the defendants were appointed administrators of his estate in Massachusetts by the said probate court on the fourteenth day of May, A. D. eighteen hundred and eighty-three.

At the trial of this cause on the ninth day of December, A. D. eighteen hundred and eighty-six, the said Marie R. Liebsch was called as a witness in her own behalf to testify to the delivery of said sum of five thousand dollars to said C. Brown Snyder in his lifetime, and under what circumstances, and to his promises in relation thereto ; but, objection being made by the defendants as to her competency to testify to the same, the cause, on motion of the plaintiff's counsel, was withdrawn from the jury and continued.

Afterwards, on the thirteenth day of December, A. D. eighteen hundred and eighty-six, the said Marie R. Liebsch resigned her office as administratrix of the estate of said Francis J. Liebsch, and

her resignation was accepted on the same day by said probate court, and on the same day Emil V. Fiedler was appointed by said probate court administrator of the estate not already administered of said Francis J. Liebsch, and afterwards he was, as of said thirteenth day of December, admitted to prosecute this suit.

The suit came on for trial again at the May term, A. D. eighteen hundred and eighty-seven of this court, and the said Marie R. Liebsch was offered as a witness on behalf of the plaintiff to testify against the defendants to transactions of herself and said Francis J. Liebsch with said C. Brown Snyder tending to sustain the
18 plaintiff's claim in this case and to statements by said C. Brown Snyder to her and said Francis J. Liebsch tending to sustain the plaintiff's claim in this case. The defendants objected to her competency as a witness to testify to such transactions and statements unless called by the defendants to testify thereto or required to testify thereto by the court; but the court refused to sustain this objection and ruled that she was a competent witness to testify to such transactions and statements when called by the plaintiff; to which refusal and ruling the defendants excepted. She thereupon testified to such transactions and statements and her testimony was material, and she was the only witness called by the plaintiff except a witness from the probate court as to the administration proceedings. The jury returned a verdict for the plaintiff in the sum of sixty-six hundred and eighty-four dollars. The defendants, being aggrieved by the aforesaid refusal and ruling of the court, present this their bill of exceptions, and pray that it may be allowed by the court.

ESTHER S. SNYDER,
GEORGE A. FRINK,
Administrators,
By JOSHUA D. BALL,
Their Att'y.

The foregoing bill of exceptions, having been examined and found conformable to the truth, is allowed this 27th day of June, A. D. eighteen hundred and eighty-seven, which is during the term at which the trial took place.

THOMAS L. NELSON,
District Judge, Presiding at the Trial.

A true record.
Attest: JOHN G. STETSON, *Clerk.*

19 The following assignment of errors is transmitted with the record:

Defendants' Assignment of Errors. (*Filed Aug.* 6, 1887.)

And now Esther S. Snyder and George a Frink, administrators of the estate of C. Brown Snyder, defendants in the above-entitled action, come and assign as errors therein the following, to wit:

That the court ruled, against the defendants' objection, that Marie

R. Liebsch, who, as administratrix of the estate of Francis J. Liebsch, brought this action and was offered as a witness by plaintiff, was, when offered by plaintiff, a competent witness to testify against the defendants to transactions of said Marie R. Liebsch and Francis J. Liebsch with said C. Brown Snyder tending to sustain the plaintiff's claim in this case, and to statements by said C. Brown Snyder to her and said Francis J. Liebsch tending to sustain the plaintiff's claim in this case, and admitted her, against defendants' objection, as a witness to testify against the defendants to such transactions and statements when called as a witness by plaintiff, she not having been called by the defendants to testify thereto, nor required to testify thereto by the court, whereas the court should have ruled that she was not, when called by plaintiff, a competent witness to such transactions and statements, and should have excluded her from testifying thereto.

ESTHER S. SNYDER,
GEORGE A. FRINK,
Administrators,
By BALL & TOWER,
Their Attorneys.

20 UNITED STATES OF AMERICA, *Massachusetts District,* } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled: 2559; Emil V. Fiedler, administrator, plaintiff, *v.* Esther S. Snyder *et al.*, administrators, defendants, lately determined in said circuit court, and of all proceedings therein, and of the assignment of errors and prayer for reversal filed therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this tenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

21 *Bond on Writ of Error.*

Know all men by these presents that we, Esther S. Snyder, widow, and George A. Frink, both of the city, county, & State of New York, administrators of the goods & estate of C. Brown Snyder, as principals, and Eben D. Jordan, of Boston, in the county of Suffolk, in the Commonwealth of Massachusetts, and William H. Long, of Chelsea, in said county of Suffolk, as sureties, are held and firmly bound unto Emil V. Fiedler, of said Boston, administrator *de bonis non* of Francis J. Liebsch, in the full and just sum of eleven thousand dollars, to be paid to the said Fiedler, administrator as aforesaid, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs,

executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-third day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a circuit court of the United States for the first circuit within and for the district of Massachusetts, to wit, at the May term thereof, A. D. eighteen hundred and eighty-seven, to wit, on the fifth day of July last, in a suit depending in said court between said Fiedler, as administrator as aforesaid, plaintiff, and said Esther S. Snyder and George A. Frink, administrators as aforesaid, defendants, judgment was rendered against the said Esther S. Snyder and George A. Frink, administrators as aforesaid, and the said Esther S. Snyder and George A. Frink, as administrators as aforesaid, having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Emil V. Fiedler, administrator as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Esther S. Snyder and George A. Frink, administrators as aforesaid, shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

ESTHER S. SNYDER. [L. S.]
GEORGE A. FRINK. [L. S.]
E. D. JORDAN. [L. S.]
WM. H. LONG. [L. S.]

Signed, sealed, and delivered in presence of—

WM. K. TOWNSEND.
JOSHUA D. BALL to W. H. L.
TYLOR BRIGHAM to E. D. J.

Approved.

THOMAS L. NELSON,
U. S. District Judge, Sitting in Circuit Court.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

22 *Acknowledgment Indorsed on Bond.*

STATE OF CONNECTICUT, }
County of New Haven, } *ss:*

On the 23rd day of August, 1887, before me personally appeared Esther S. Snyder and George A. Frink, to me known and known to me to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same as administrators of the estate of C. Brown Snyder, deceased, for the uses and purposes therein mentioned.

WM. K. TOWNSEND, [SEAL.]
Notary Public.

A true copy.

Attest: JOHN G. STETSON, *Clerk.*

23 *Citation.*

The United States of America to Emil V. Fiedler, of Boston, in the district of Massachusetts, administrator *de bonis non* of the estate of Francis J. Liebsch, late of said Boston, deceased, intestate, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein Esther S. Snyder and George A. Frink, both of the city of New York, administrators of the estate of C. Brown Snyder, deceased, intestate, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas L. Nelson, district judge of the United States for the district of Massachusetts, sitting in the circuit court, this twenty-third day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

THOMAS L. NELSON,
District Judge, Sitting in Circuit Court.

24 U. S. OF AMERICA, }
Massachusetts District, } *ss:*

BOSTON, *September 1st,* 1887.

Pursuant hereunto I have cited the within-named Emil V. Fiedler to appear at court, as within directed, by giving him in hand a duly attested copy of this precept.

W. M. H. COPELAND,
Deputy U. S. Marshal.

Fees:

Service	2 00
Cop'ng	1 00
Trv. exp.	22
	$3 22

Endorsed on cover: Massachusetts C. C. U. S. No. 231. Esther S. Snyder and George A. Frink, administrators of C. Brown Snyder, deceased, plaintiffs in error, *vs.* Emil V. Fiedler, administrator *de bonis non* of Francis J. Liebsch, deceased. Filed October 14, 1887.

Office Supreme Court U. S.
FILED,
FEB 24 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 231.

ESTHER S. SNYDER AND GEORGE A. FRINK,

Administrators of the Estate of C. BROWN SNYDER, deceased,

PLAINTIFFS IN ERROR,

v.

EMIL V. FIEDLER,

Administrator de bonis non of FRANCIS J. LIEBSCH, deceased,

DEFENDANT IN ERROR.

BRIEF OF JOSHUA D. BALL,

In behalf of Plaintiffs in Error.

BOSTON:
PRESS OF ROCKWELL AND CHURCHILL.
1891.

Supreme Court of the United States.

OCTOBER TERM, 1890. No. 231.

ESTHER S. SNYDER AND GEORGE A. FRINK,

ADMINISTRATORS OF C. BROWN SNYDER, DECEASED, PLAINTIFFS IN ERROR,

v.

EMIL V. FIEDLER,

ADMINISTRATOR DE BONIS NON OF FRANCIS J. LIEBSCH, DECEASED, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

The question in this case is whether Marie R. Liebsch, who as administratrix of the estate of Francis J. Liebsch deceased, brought this suit against the adminstrators of C. Brown Snyder deceased, and who resigned as administratrix while the suit was pending in court, was a competent witness for her successor in office, the administrator *de bonis non* to testify to transactions with and statements by the defendants' intestate.

STATEMENT OF CASE.

The plaintiffs in error were defendants in the court below. April 30, 1885, Marie R. Liebsch of Boston, administratrix of the estate of Francis J. Liebsch, brought this action at common law in the Superior Court, Suffolk County, Massachusetts, against Esther S. Snyder and George A. Frink, both of the City of New York, administrators of the estate of C. Brown Snyder (pp. 2, 3). The action was an action of contract and the declaration alleged that said Francis J. Liebsch died in December, 1880, that on Oct. 15, A.D. 1876, said Francis J. Liebsch delivered to said C. Brown

Snyder the sum of $5,000, the property of said Francis, which sum the declaration alleged said C. Brown Snyder promised the said Francis to invest for him and for his benefit and profit; that said C. Brown Snyder never invested said moneys nor accounted with said Francis for the same or any investments thereof and never repaid the same to said Francis, and that neither said C. Brown Snyder nor his administrators ever paid said moneys to the plaintiff administratrix as aforesaid, although often requested so to do by her. Said declaration further alleged that said C. Brown Snyder died on or about July 18, 1882, and that the defendants, said Esther S. Snyder and George A. Frink, were legally appointed administrators of his goods and estate in Massachusetts May 14, 1883, and that they owed the plaintiff $5,000 and interest thereon since Oct. 15, 1876. The declaration also alleged that the defendants owed the plaintiff $5,000 for money lent Oct. 15, 1876, by the plaintiff's intestate, Francis J. Liebsch, to the defendants' intestate, C. Brown Snyder, together with interest since that day. The declaration also alleged that the defendants owed the plaintiff $7,575 according to the account annexed to the declaration. And the account annexed was in the following words and figures, viz.: "$5,000 delivered to C. Brown Snyder, the defendants' intestate by Francis J. Liebsch the plaintiff's intestate, on the 15th day of October, 1876, and $2,575 interest thereon since that day" (p. 4). The answer (p. 5) alleged that said C. Brown Snyder died July 18, 1882, and the due appointment and qualification on May 14, 1883, of the defendants as administrators of his estate, alleged ignorance of the time of said Francis J. Liebsch's death, and neither admitted nor denied the allegation in the declaration as to the time of his decease, but left the plaintiff to prove the same; denied all the other allegations in the plaintiffs' declaration contained; and the answer further alleged that if said Francis J. Liebsch ever delivered to said C. Brown Snyder any money whatsoever to invest, which the defendants denied, said C. Brown Snyder duly invested the same and duly accounted for and delivered the property, representing the same to said Francis J. Liebsch, and that if said Francis J. Liebsch ever lent or delivered any money whatsoever to said C. Brown Snyder, which the defendants denied, said C. Brown Snyder duly repaid the same to said Francis J. Liebsch. The answer further set up

the special statute of limitations of Massachusetts of two years, in favor of administrators.

The case was duly removed by the administrators of said C. Brown Snyder to the Circuit Court of the United States for the District of Massachusetts, where it was duly entered (pp. 6, 7, 8, 2).

Dec. 9, 1886, the case came on for trial in said Circuit Court, and a jury was empanelled and sworn to try the same (p. 8). At the trial on that day the said Marie R. Liebsch, the plaintiff, was called as a witness in her own behalf to testify to the delivery of said sum of $5,000 to said C. Brown Snyder in his lifetime and under what circumstances and to his alleged promises in relation thereto; but objection being made by the defendants as to her competency to testify to the same, the cause on motion of plaintiffs' counsel was withdrawn from the jury and continued (p. 10). Afterwards, on Dec. 13, 1886, she resigned her office as administratrix of the estate of said Francis J. Liebsch, and her resignation was accepted on the same day by the Probate Court, and on the same day Emil V. Fiedler was appointed by that court administrator *de bonis non* of said Francis J. Liebsch, and afterwards he was as of said Dec. 13, 1886, admitted to prosecute the suit (pp. 10, 11). The suit came on for trial again at the May term, 1887, of said Circuit Court, and she was offered as a witness on behalf of plaintiff to testify against the defendants, the administrators of said C. Brown Snyder, to transactions of herself and said Francis J. Liebsch with said C. Brown Snyder tending to sustain the plaintiffs' claim in this case and to statements by said C. Brown Snyder to her and said Francis J. Liebsch tending to sustain the plaintiffs' claim. The defendants objected to her competency as a witness to testify to such transactions and statements unless called by the defendants to testify thereto, or required to testify thereto by the court; but the court refused to sustain this objection and ruled that she was a competent witness to testify to such transactions and statements when called by the plaintiff, to which refusal and ruling the defendants excepted. She thereupon testified to such transactions and statements, and her testimony was material, *and she was the only witness called by plaintiff, except a witness from the Probate Court, and he testified only as to administration proceedings.* The jury returned a verdict for plaintiff for $6,684 (p. 11). The plaintiffs'

counsel at the trial of the cause (not the defendants' counsel) claimed that $1,400 had been paid by said C. Brown Snyder to said Marie R. Liebsch at different times after the death of said Francis J. Liebsch, and that that sum should be deducted from the claim in suit (p. 10). Said Francis J. Liebsch died in Boston, December, 1880, and said Marie R. Liebsch, *who was his widow*, was appointed administratrix of his estate by the Probate Court April 27, 1885. Said C. Brown Snyder died July 18, 1882, and the defendants were appointed administrators of his estate in Massachusetts, May 14, 1883 (p. 10).

SPECIFICATION OF THE ERROR RELIED UPON.

The administrators of said C. Brown Snyder assigned as error, "That the court ruled, against the defendants' objection, that Marie R. Liebsch, who, as administratrix of the estate of Francis J. Liebsch, brought this action and was offered as a witness by plaintiff, was, when offered by plaintiff, a competent witness to testify against the defendants to transactions of said Marie R. Liebsch and Francis J. Liebsch with said C. Brown Snyder tending to sustain the plaintiff's claim in this case, and to statements by said C. Brown Snyder to her and said Francis J. Liebsch tending to sustain the plaintiff's claim in this case, and admitted her, against defendants' objection, as a witness to testify against the defendants to such transactions and statements when called as a witness by plaintiff, she not having been called by the defendants to testify thereto nor required to testify thereto by the court, whereas the court should have ruled that she was not, when called by the plaintiff, a competent witness to such transactions and statements and should have excluded her from testifying thereto" (p. 11).

BRIEF OF THE ARGUMENT.

The alleged delivery of the money to the defendants' intestate is alleged to have taken place Oct. 15, 1876 (p. 4). Liebsch, the husband, died in December, 1880; the defendants' intestate died July 18, 1882, and the defendants were appointed administrators of his estate in Massachusetts, May 14, 1883. Marie R. Liebsch was appointed administratrix of her husband's estate April 27,

1885. This suit was brought April 30, 1885, after all persons having any knowledge on the subject (unless Mrs. Liebsch had some such knowledge) had died, and more than eight years and a half after the alleged delivery of the money.

Sect. 858 of the Revised Statutes of the United States is as follows: —

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: Provided that in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admirality."

The overruling by the court of the objection to the competency of Mrs. Liebsch was not equivalent to a requirement by the court that the witness should testify, but is a *decision that she has the right to testify*.

Cupp *v.* Ayers, 89 Indiana, 60.
Eslava *v.* Mazange, 1 Woods, pp. 625–626.

In Eslava *v.* Mazange, 1 Woods, pp. 625 and 626, Mr. Justice Bradley says: —

"*This act is a recognition of the glaring injustice it would involve to permit one party to propound himself as a witness in his own behalf as to a transaction between him and a deceased person who can no longer give his version of the affair. If the law were to allow a man to wait until his antagonist were dead and then to sue his heirs and put himself upon the witness stand and give his version of the affair with no one to contradict or qualify his testimony, it would be as gross a prostitution of the forms of law as to allow a man to be a judge in his own cause. Every honest mind revolts against it. There may be special cases, it is true, in which the court can see that no injustice would be done by calling on a*

party to testify, even though his adversary be deceased. But it is useless to attempt to anticipate such cases. When they arise it will be for the court and not the party himself to suggest that he be called, or if he make the suggestion the other party ought at least to be heard upon it."

To same effect Mobile Savings Bank *v.* McDonnell, 87. Alabama, 736, 740.

This court has held that where a case is removed from the State Court into the Circuit Court of the United States, the laws of the United States in respect to the competency of witnesses govern, and not the laws of the State.

King *v.* Worthington, 104 U.S., 44.

That case was a case from the Northern District of Illinois, and the laws of Illinois and of the United States differed upon the subject.

This court has also held that the exclusion in Sect. 858 of Rev. Stat. U.S. applies only to parties to the record, and not to those merely interested in the issue.

Potter *v.* National Bank, 102 U.S., 163.

Mrs. Liebsch was incompetent under the plain language of Sect. 858. The action was by an administratrix against administrators. It was one in which judgment might be rendered for or against an administratrix or administrators. No other judgment could be rendered in the case. If any judgment was rendered it must of necessity be one either for or against an administratrix or administrators. If the judgment was for the plaintiff, it would be a judgment for an administratrix against administrators, and if for the defendants it would be a judgment for administrators against an administratrix. She was the original plaintiff. She brought the suit and prosecuted it, and when she found that she was not a competent witness she resigned as administratrix in the hope of thereby rendering herself competent. She was allowed to testify against the defendants as to transactions with and statements by their intestate, and her testimony was material and without the slightest corroboration. She was the only witness called by the plaintiff except a witness from the Probate Court, and he was called only as to administration proceedings.

If the court should hold that the competency of the witness as to transactions with or statements by the defendants' intestate is to be determined by the rules of the common law as to parties, Mrs. Liebsch would, under these rules, be incompetent, being a party to the record.

On the score of interest she would have been incompetent, being the widow of Francis J. Liebsch, and directly interested in his estate. That is probably not material to be considered, but as a party she would be incompetent. Greenleaf, speaking of the competency of witnesses, says: "And first, in regard to *parties*, the general rule of the common law is, that a *party to the record*, in a civil suit, *cannot be a witness*, either for himself or for a co-suitor in the cause. The rule of the Roman law was the same: *Omnibus in re propriâ dicendi testimonii facultatem jura submoverunt.* This rule of the common law is founded not solely in the consideration of interest, but partly also in the general expediency of avoiding the multiplication of temptations to perjury," etc.; "and it is not to be presumed that a man who complains without cause, or defends without justice, should have honesty enough to confess it." "The rule of the common law goes still further in regard to *parties to the record* in *not compelling* them in trials by jury to give evidence for the opposite party against themselves either in civil or in criminal cases."

1 Greenleaf on Evidence, Sects. 329, 330.

Mr. Justice Nelson, in Bridges *v.* Armour, 5 Howard, 94, says: "Whether a party on the record, divested of all interest in the result of the suit, and therefore unexceptionable on that ground, is a competent witness or not in the cause, can scarcely be regarded as an open question in this court, after what has already fallen from it. It is true, as stated by the counsel in the argument, that in all the cases in which the question has arisen, the party was liable for the costs of suit, and therefore interested; but whenever the question has been presented the language of the court has been uniform, that the witness was incompetent on the ground of his being a party on the record."

Mr. Justice McLean, in Stein *v.* Bowman, 13 Peters, 209, says, on page 219: "No rule is better established than that a party in an action at law cannot be a witness in his own case." And in

that case the court holds that no release could make him competent.

Also *vide* Scott *v.* Lloyd, 12 Peters, 145.

Also to the same point that the exclusion of a party is on the ground of *public policy*.

Gilmore *v.* Bowden, 12 Maine, 412.
Supervisors *v.* Birdsall, 4 Wendell, 457.
Frear *v.* Evertson, 20 John, 142.
Page *v.* Page, 15 Pick. 368.
Spaulding *v.* Bancroft, 23 Pick., 54.
Mobile Savings Bank *v.* McDonnell, 87 Alabama, 736.

For the same reason, public policy, is the exclusion of husband and wife at common law.

Lucas *v.* Brooks, 18 Wallace, 436, 453.

There was no motion in this case to strike Mrs. Liebsch's name from the record and insert Fiedler's name, and had such motion been made and allowed, it would have been fatal to the maintenance of the suit. Because Fiedler was not administrator when the suit was brought, and that fact alone, if his name had been substituted for hers, would have defeated the action.

A party who is such at the "impetration" of the writ cannot testify,

Wolf *v.* Fink, 1 Barr, 435;
Parke *v.* Bird, 3 Barr, 360;

although no service be made upon him.

Marshall *v.* Franklin Bank, 25 Penn. State, 384.
Jenks *v.* Opp, 43 Indiana, 108.

Suit against principal and surety on administration bond. B, the principal, died, and his name stricken from the record Held, that plaintiff could not testify as to facts occurring prior to the death of B.

Lacock *v.* Commonwealth, 99 Penn. State, 207.

Where bill is taken *pro confesso* against one of the defendants, he is not a competent witness for the other defendants.

DeWolf *v.* Johnson, 10 Wheaton, 368.

Suit by plaintiffs, and they became bankrupt and got their discharge, and their assignee came in to prosecute and then offered one of the bankrupts as a witness. Held incompetent.

Bridges *v.* Armour, 5 Howard, 91.

Same rule in England.

Fisher *v.* Fisher, 6 Hare, 628. S. C. 16 Law Journal new series, chy., part 1, p. 320.

Hewatson *v.* Tookey, Dickens, 799.

In Ewer *v.* Atkinson, 2 Cox, 393, the bankrupt's name was stricken from the original bill, and he was then examined.

In debt on bond, one of defendants pleaded his discharge in bankruptcy and plaintiff entered *nolle prosequi* as to him. He was held to be incompetent as a witness.

Irwin *v.* Shumaker, 4 Penn State, 199.

Where one of defendants confesses judgment he is an incompetent witness in the suit.

Columbian Mfg. Co. *v.* Dutch, 13 Pick., 125.
Church *v.* Howard, 79 New York, 415.
Hill *v.* Hotchkin, 23 Hun., 414.
Schermerhorn *v.* Schermerhorn, 1 Wendell, 119.
Noble *v.* Laley, 50 Penn. State, 281.
Swanzey *v.* Parker, 50 Penn. State, 444.
Cambria Iron Co. *v.* Tomb, 48 Penn. State, 387.
Wing *v.* Andrews, 59 Maine, 509.
Thornton *v.* Blaisdell, 37 Maine, 190.
Walton *v.* Tomlin, 1 Iredell, (Law) 593.
Mant *v.* Mainwaring, 8 Taunton, 139.
Brown *v.* Brown, 4 Taunton, 752.
Worthington *v.* Miller (Ky.), 3 S. W. Reporter, 532.
Good *v.* Martin, 2 Colorado, 218.

Where one of the plaintiffs who were trustees of a charity resigned, he was held incompetent as a witness.

Adams *v.* Leland, 7 Pick., 62.

In U.S. *v.* Leffler, 11 Peters, 86, the action was an action of debt brought by the U.S. in the District Court, U.S., against a principal and various sureties upon a joint and several bond, given by a person appointed by the United States collector of direct taxes and internal revenue in Virginia. Separate pleas filed by defendants. Principal afterwards withdrew his plea and judgment was rendered in the District Court against him for the debt. The judge being interested, the case was certified to the Circuit Court, U.S. At the trial afterwards, one of the sureties offered the deposition of the principal, to which plaintiff objected; but it appearing that judgment had been rendered in favor of the plaintiff against the principal, and that afterwards and before the examination of the witness, the United States had sued out execution on the judgment against his body; and his body was seized, and while under arrest in the hands of the marshal, he was, by warrant from the President of the United States, discharged from custody under the laws of the United States, and that the only defendants alive before he testified released him from all claim; his deposition was held to be competent. It appears on page 100, that the deposition was given some ten or eleven years after the judgment against him was rendered. The case is put on the ground that he was severed from the record by the judgment.

But in the case at bar, Mrs. Liebsch was never severed from the record as a party. Nor could she be. Had her name been stricken from the record, the action must have failed, because when the action was brought, she alone could bring it. Besides, in the case of one of several defendants the name of one could be stricken out, or one might be severed from the record and the case proceed against the others. But in the case of a necessary plaintiff, if such plaintiff's name be severed from the record, the action must fail.

The maxim of the common law, *Nemo testis esse debet in propriâ causâ*, applied with as much force to Mrs. Liebsch after her resignation as administratrix, as before.

Monongahela National Bank *v.* Jacobus, 109 U.S., 275, was not an action by or against an administrator, in which judgment could be rendered for or against him, and the decision is put on that ground.

In Goodwin *v.* Fox, 129 U.S., 631, no decree was asked in favor of the executrix. She claimed an interest only as devisee, and the testimony of the party who was admitted as a witness was not to transactions between him and the deceased, but between himself and a person then living.

In England where in civil cases parties and husbands and wives can testify for and against each other, and there is practically no exclusion, the rule is not to act upon the uncorroborated evidence of a party as to transactions with a deceased person.

Rogers *v.* Powell, 18 Weekly Reporter, 282.
Morley *v.* Finney, 18 Weekly Reporter, 490.
Hill *v.* Wilson, 8 Law Rep. Ch'y Appeals, 888.
Fowkes *v.* Pascoe, 10 Law Rep. Ch'y Appeals, 343.
(In this case there was corroboration)
In re Whittaker, 21 Law Rep. Ch'y Division, 657, 663.
In re Finch, 23 Law Rep. Ch'y Division, 267
In re Harnett, 17 Law Rep. Ch'y Division, Irish, 543.

This rule was questioned *in re* Garnett, 31 Law Rep. Ch'y Division, 9, and *in re* Hodgson, 31 Law Rep. Ch'y Division, 177, 183.

But in *in re* Harnett the rule is said to be absolute, notwithstanding the two cases in 31 Law Rep. Ch'y Division.

As to the exercise of the discretion of the court to call as a witness, a party (otherwise incompetent) to testify to transactions with a deceased person, the court in Chandler *v.* Davis, 47 New Hampshire, 462, say, he will not ordinarily be admitted to testify to a fact which was within the knowledge of the testator or intestate, and to which the testator or intestate might have testified if living. See also Eslava *v.* Mazange, 1 Woods, 625, 626.

It is submitted in conclusion that Mrs. Liebsch was not under the circumstances a competent witness to transactions with or statements by the defendants' intestate, unless called as a witness by

them or required to testify thereto by the court, and as the court below ruled that she was a competent witness although not called as a witness by the defendants, nor required by the court to testify, and admitted her testimony, the judgment should be reversed.

JOSHUA D. BALL,
For Plaintiffs in Error.

Office Supreme Court U. S.
FILED,
MAR 19 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

WASHINGTON, D. C.

OCTOBER TERM, 1890.

No. 231.

ESTHER A. SNYDER AND GEORGE A. FRINK,
ADMINISTRATORS OF ESTATE OF C. BROWN SNYDER,
DECEASED,
PLAINTIFFS IN ERROR,

vs.

EMIL V. FIEDLER, ADMINISTRATOR DE BONIS NON, OF THE
ESTATE OF FRANCIS J. LIEBSCH, DECEASED,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MASSACHUSETTS.

Brief of Defendant in Error.

Supreme Court of the United States.

WASHINGTON, D. C.

OCTOBER TERM, 1890.

No. 231.

ESTHER A. SNYDER AND GEORGE A. FRINK,
ADMINISTRATORS OF ESTATE OF C. BROWN SNYDER,
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EMIL V. FIEDLER, ADMINISTRATOR DE BONIS NON, OF THE ESTATE OF FRANCIS J. LIEBSCH, DECEASED,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Brief of Defendant in Error.

The plaintiff who originally brought this action was Marie R. Liebsch, as she was administratrix of the goods and estate of Francis J. Liebsch, late of Boston, and she was his widow.

The action was begun in the Superior Court in the Commonwealth of Massachusetts, and was properly brought under the laws of that Commonwealth, and service was duly made upon the plaintiffs in error. In that Court Marie R. Liebsch was entitled to testify, under the law.

Pub. Stat. of Mass., Chap. 169, Sec. 18.

The plaintiffs in error, who had qualified as administrators in Massachusetts, removed the action to the United States Circuit Court, District of Massachusetts.

By so doing the plaintiffs in error compelled the defendant in error to adopt another rule of evidence, which is the Federal rule.

Rev. Stats. of the U. S., Chap. 17,Sec. 858.

The plaintiffs in error, *coram* Carpenter J., who held the term, objected to said Marie testifying, she being administratrix of the estate of the said Francis J. Liebsch, deceased.

Thereupon the Justice allowed the case to be continued so that the said Marie could resign and another person be appointed in her place as administrator.

Said Marie R. Liebsch did then resign her trust, and Emil V. Fiedler was appointed administrator in her stead, and after the resignation of the said Marie, and after the appointment of said Fiedler, during the subsequent trial said Marie, after objection by the plaintiffs in error, and after argument on that before the Court, by the decision of the Court, was allowed to testify.

The defendant in error submits that at the time of that trial said Marie was not an administratrix, and that there was no legal objection to her being permitted by the Court to testify as a witness.

King *vs.* Worthington, 104 U. S. 50.
Potter *vs.* National Bank, 102 U. S. 163.
Monongahela National Bank *vs.* Jacobs, 109 U. S. 275.

The defendant in error submits that the exceptions and the assignments of error of the plaintiffs in error are frivolous, and that the writ was sued out merely for delay, and that he ought to have an allowance therefor by way of damages or costs, or both, as the Court may think just.

Rule of the Supreme Court of the U. S. No. 23.

John P. Treadwell
~~WILLIAM A. MORSE,~~

Attorney for Defendant in Error.